50. On April 20, 1993 Ms. Richter wrote to Mr. McKinnon, copying Mr. Nourain, in which she repeated the matters that she had discussed with Mr. Nourain. Richter, Tr. 2051-53; TWCV Ex. 55 (Richter Deposition, 5/12/97, at 87); Nourain, Tr. 2264. The letter clearly states that Liberty must have a license or STA in hand before activating a microwave path. TWCV Ex. 51. Mr. Nourain testified that the letter did not contain any new information, because he already knew that he could not turn on a system without authorization. Nourain, Tr. 2265.

51. Ms. Richter believed that Mr. Nourain had a correct understanding of the rules after the April 20, 1993 letter. Richter, Tr. 2061.

2. Mr. Nourain disregarded FCC rules by operating under groundless assumptions.

52. Mr. Nourain's discussions with Ms. Richter in April 1993, as well as his receipt of the Richter letter provided Mr. Nourain with a precise guideline -- FCC authorization was needed prior to activating a path. Supp. Findings, ¶¶ 40-41, 48-51. Therefore, even if Mr. Nourain was confused about the Commission's rules prior to April 1993, he certainly understood the rules after that date.

53. After April 1993, in complete disregard of the Commission's rules and the clear direction he received from counsel, both orally and in writing, Mr. Nourain continued to activate microwave paths without authorization. In the period May through June of 1993, Liberty activated four microwave facilities either prior to or concurrent with filing applications for those paths.

54. First, Liberty's business records state that it began to install customers at 33 W. 67th Street in June 1993 and completed installation on June 30, 1993. TWCV Ex. 14.

However, the application to add 33 W. 67th Street as a new path from One Lincoln Plaza has a signature date of June 11, 1993. TWCV Ex. 66; Nourain, Tr. 2277-78. The application was stamped by the FCC on June 16, 1993. TWCV Ex. 66.

55. Liberty could not have been authorized to activate the receiver at 33 W. 67th Street at any time in June 1993. Even if the application went on public notice immediately, the thirty day period would not have run before the end of June 1993. See TWCV Exs. 56, 57. Therefore, Liberty's application could not have been granted at any time in June 1993. Liberty also would not have possessed an STA for this address because in June 1993 it was Liberty's practice to file for STA after the thirty day public notice period had run. TWCV Ex. 62. Liberty has not denied that it operated this path without FCC authorization. Order, WT Docket No. 96-41, FCC 97M-63, at 5 (rel. April 21, 1997).

56. In addition to 33 W. 67th Street, first identified in the TWCNYC motion that resulted in the May hearing, Liberty activated paths to three other addresses prior to receiving authorization from the Commission. The three other addresses are: 150 E. 69th Street (Imperial House), 333 E. 55th Street and 25 Sutton Place. Installation of customers at the 69th Street address began in May 1993; the application to add a microwave path to that address was filed on May 21, 1993. TWCV Ex. 14; Attachment E.[6] Installation of customers at the 55th Street address began in May 1993; the application to add a microwave path to that address was filed on May 21, 1993. TWCV Ex. 14; Attachment F. Installation

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[6]The Presiding Judge may take judicial notice of official Commission records. Fed. R. Ev. 201; 47 C.F.R. § 1.351; see also Sippel, Tr. 2157. The Presiding Judge does so with respect to the applications for these paths.

of customers at the Sutton Place address began in June 1993; the application to add a microwave path to that address was filed on June 16, 1993.[7] TWCV Ex. 14; Attachment G.

57. Mr. Nourain testified that he did not turn on a path unless he thought he had authorization to do so. Nourain, Tr. 2282. However, Mr. Nourain never actually knew whether he had authorization in hand prior to activating a path. E.g., Supp. Findings, ¶ 38; Nourain, Tr. 2324-28.

58. Mr. Nourain apparently continued to operate under the assumption that he could activate a path based on a timeline he devised. See Findings, ¶¶ 58, 60-61. He did not verify whether he actually had a license or STA prior to activating a path. Findings, ¶¶ 60, 62-64; Nourain, Tr. 2242-43, 2324-28.

59. Mr. Nourain did not tell Ms. Richter that he was assuming that Liberty was authorized to activate a path a certain number of days after an application had been filed, or had been on public notice, or after an STA had been filed. Richter, Tr. 2077-78. Ms.

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[7]The Presiding Judge has rejected as a "waste of time" under Fed. R. Ev. 403 a proffered TWCNYC exhibit purporting to show 21 instances during the period July 1, 1992-June 30, 1993 where Liberty activated a microwave path either before or during the month in which it had filed an application to add that path. The Presiding Judge has avoided having the hearing become a complete audit of Liberty's licensing from the beginning of time. It is not necessary to do so in this proceeding. When Liberty told the Commission in May 1995 that, in essence, the instances of unlicensed operation that it was admitting were an aberration, it should have conducted its own audit or qualified that representation. Mr. Price has testified that one reason for the delay in revealing Liberty's 1995 unlicensed activations to the Commission, discovered in late April but not revealed until mid-May, was the need to assemble all of the relevant information. Findings, ¶ 149. Liberty had Commission licenses and its own list of installation dates; there is no reason a comparison could not have been done in the 20 days between when Liberty said it discovered it had unlicensed operations and when it filed the Surreply. The number of unlicensed operations in the February through June 1993 period alone rules out the possibility of an excusable mistake. Evidence of additional unlicensed activations, though it may exist, would be cumulative of evidence already in the record.

Richter explicitly informed Mr. Nourain that he needed FCC authorization in hand prior to activating a microwave path. She did not advise Mr. Nourain that he could assume he could activate a path for which an application had been filed under any circumstances, except for receipt of a license or STA for that path. Richter, Tr. 2078.

60. Mr. Nourain claims to have activated paths based on his belief that STAs for those paths were received by Liberty. Nourain, Tr. 2243, 2324-28. There is no basis for this claim. First, Ms. Richter did not recall filing any STA requests prior to April of 1993. Richter, Tr. 2065. Second, when Mr. Nourain did receive an STA he was not able to identify the microwave path to which it applied. Findings, ¶ 62. Although he did not understand the information provided in the STA, he never asked counsel for clarification. Nourain, Tr. 2327-30.

B. Mr. Price Disregarded Counsel's Clear Warning That Liberty Was Not Complying With Commission Rules.

61. After receiving the Richter letter, Mr. Nourain forwarded it to Mr. Price with the following handwritten note: "Peter: pls. review and advise. B.N. 4/28/93." TWCV Ex. 51. Mr. Nourain sent the letter to Mr. Price because Mr. McKinnon was leaving the company and he wanted Mr. Price to know about the licensing process. Nourain, Tr. 2272. Mr. Nourain also wanted Mr. Price to know about the application processing timelines in the letter and to inform him that STA applications would be filed. See Nourain, Tr. 2273-74, 2331-32.

62. Ms. Richter sent the letter to Mr. McKinnon because she wanted to "make sure that Mr. Nourain's superior, Mr. McKinnon, understood these rules and that I was having some concern that there was some confusion about the rules." Richter, Tr. 2054-55;

see id. at 2004. Ms. Richter hoped to raise some concern and to get a reaction from Liberty. The purpose of the letter was to get Liberty's attention and to prevent unauthorized activations that she feared were a possibility. Richter, Tr. 2046; see id. at 2060-61.

63. After receiving the Richter letter on or about April 28, 1993, Mr. Price spoke with Ms. Richter about applying for STAs. Richter, Tr. 2062; Price, Tr. 2170, 2191, 2193-94, 2199; TWCV Ex. 61. Mr. Price told Ms. Richter to file requests for STA as a matter of course after an application was accepted for filing by the Commission. Richter, Tr. 2062. As detailed in a May 25, 1993 letter to Mr. Price, Ms. Richter complied with his request. TWCV Ex. 62; Richter, Tr. 2062-63. This telephone conversation with Mr. Price was Liberty's only response to the Richter letter. Richter, Tr. 2047. No one at Liberty expressed a concern regarding inadvertent activation. Richter, Tr. 2047.

64. In April 1993 it was uncommon for Mr. Nourain to forward documents to Mr. Price. Price, Tr. 2168. In fact, Mr. Price rarely received documents from Mr. Nourain (Price, Tr. 2168-69), nor did he have any regular contact with Mr. Nourain. Price, Tr. 2192.

65. Although Mr. Nourain's request for advice was out of the ordinary, Mr. Price did not discuss the letter with Mr. Nourain to discover whether anything concerned Mr. Nourain, or to ascertain what Mr. Nourain wanted from Mr. Price. Price, Tr. 2190-91. Mr. Price interpreted Mr. Nourain's note as a request to look at the letter and take action, but he never called Mr. Nourain to discuss what Mr. Nourain wanted. Price, Tr. 2190-91.

66. Mr. Price viewed the Richter letter simply as Ms. Richter's attempt to "highlight[] a problem, that STAs should be filed on a more timely basis." Price, Tr. 2171.

He also testified that the Richter letter "outlines the policy that should prevail and I thought was prevailing regarding the filing for licenses and the activation of paths and advises us that STAs should be filed, and we did so." Price, Tr. 2173.

67. Mr. Price did not take any action to investigate the circumstances surrounding the Richter letter. He simply "presume[d] that if Jennifer Richter had something on her mind that was other than in the letter or that was some violation of FCC policy or something really broken, either in our process or with one of [our] people or in our operations, she would have said to me, 'I'm certainly glad you called. We got a problem here.'" Price, Tr. 2194. He stated that he would have done something if counsel told him or hinted about a problem. Price, Tr. 2195. Mr. Price claims that he was not concerned that Mr. Nourain either did or would do something inconsistent with FCC rules after reading the first paragraph of the Richter letter which states in part that "[s]ome things were revealed during these conversations that gave both Behrooz and I pause." Price, Tr. 2173; TWCV Ex. 51. The first paragraph of the letter did not set off any alarms for Mr. Price. Price, Tr. 2206; TWCV Ex. 51.

68. Mr. Price did not forward the Richter letter to counsel or to the Milsteins. See Price, Tr. 2188, 2204. He did not believe it was necessary to forward the letter to the Milsteins because they were already aware of the procedure that Liberty was following. Price, Tr. 2204-05. Mr. Price noted that the Richter letter did not contain any new information. Price, Tr. 2206.

69. The plain language the Richter letter does not bear the strained and self-serving interpretation of it that Mr. Price offers. Without creating a document that would

put her client in jeopardy, the Richter letter, by both its own words and its author's explanation, is an obvious warning to senior management that Mr. Nourain is an employee in need of supervision, lest the company end up violating the Commission's rules in some serious ways. That Mr. Price elected to ignore that warning, and now claims that no such warning even existed, reflects poorly on the company's candor and its fitness as a licensee.

VI. Liberty Made Materially False And Misleading Statements To The Commission.

A. Liberty Included Misrepresentations In Its May 17, 1995 Surreply.

70. Liberty filed a Surreply on May 17, 1995 in support of its applications for microwave licenses. The declaration of Mr. Nourain accompanying the Surreply attests to the truth of the statements contained in the Surreply. TWCV Ex. 18.

71. In the Surreply, Liberty states that "[i]t has been Liberty's pattern and practice to await a grant of either a pending application or request for STA prior to making a microwave path operational." TWCV Ex. 18, at 3. In fact, Liberty did not have such a "pattern or practice." During the months of February through June 1993, Liberty activated thirteen new microwave paths prior to filing applications to add those paths. Supp. Findings, ¶¶ 23-29, 53-56. These paths were activated at the same time that Mr. Nourain and Ms. Richter were comparing licenses to operational paths and at the same time Mr. Nourain and Ms. Richter were discussing "unlicensed operation" of microwave facilities in conversations that Ms. Richter wrote "gave her pause." TWCV Exs. 14, 51, 61, 66. Mr. Nourain, a witness whom Liberty has disavowed with respect to other testimony, is simply not credible when he professes not to have known of any unauthorized activations in the first half of 1993. All of the other evidence suggests otherwise. Moreover, Mr. Nourain was one of two

persons whom Liberty elected to use to verify the truth of the factual statements in the Surreply. The other was Mr. Price. Not only was the statement that Liberty's "pattern and practice was to await a grant" materially false, but also Liberty lacked candor in making it.

72. In its May 17, 1997 Surreply, Liberty states that "Mr. Nourain, perhaps inadvisably, assumed grant of the STA requests which, in his experience had always been granted within a matter of days of filing and thus rendered the paths operational." TWCV Ex. 18, at 3. This statement presumes that Mr. Nourain had knowledge about whether STAs were granted within a few days of filing. Mr. Nourain did not ever have the experience of waiting to render paths operational after an STA was granted. Nourain, Tr. 2326. Rather, Mr. Nourain merely assumed that an STA was granted after a certain time. Findings, ¶¶ 60-61. This self-serving assumption has no basis in fact. Findings, ¶¶ 64-66; Supp. Findings, ¶¶ 59-60. Furthermore, Mr. Nourain assumed that because he received STAs, those STAs related to the paths that he wished to activate. Nourain, Tr. 2326-27. However, Mr. Nourain did not fully understand how to interpret the information contained on a STA and never asked counsel for clarification. Nourain, Tr. 2327-28.

B. Mr. Nourain's Statements Regarding When He Initially Became Aware Of TWCNYC's Petitions Against All Of Liberty's Microwave License Applications Are Inconsistent And Lack Candor.

73. The record contains an affidavit and a declaration signed by Mr. Nourain that include statements regarding Mr. Nourain's knowledge of TWCNYC's petitions to deny OFS applications filed by Liberty. In a February 21, 1995 affidavit filed in a United States District Court case, Mr. Nourain clearly acknowledges that he was "advised that Time

Warner has opposed Liberty's pending applications to the Federal Communications Commission for various 18 Ghz microwave licenses." TWCV Ex. 13.

74. In a May 17, 1995 declaration filed with the Commission in support of the Surreply, Mr. Nourain swears to the truth of the following statement: "Mr. Nourain was unaware of the petitions against Liberty's applications until late April of 1995." TWCV Ex. 18.

75. According to Mr. Nourain, the February affidavit refers to a TWCNYC petition against buildings connected by coaxial wire, or "I-block" buildings. He states that he "was informed by the lawyer that I was working with on these that with the various 18 gigahertz path, they were talking about particularly those interconnecting applications." Nourain, Tr. 2289-90; see id. at 2294, 2297.

76. Mr. Nourain states that the May 17, 1995 declaration references the time period "after we found out that we were -- we've turned up some of the 16 or so paths, without authorization." Nourain, Tr. 2290.

77. Jim McNaughton, Liberty's counsel, prepared the February 21, 1995 affidavit. Nourain, Tr. 2094-95. The sole basis for Mr. Nourain's claim that TWCNYC's petition only concerned applications for "I-block" buildings was an oral statement by Mr. McNaughton. Nourain, Tr. 2295-97. Mr. Nourain never saw a copy of that petition. Nourain, Tr. 2296.

78. From the period January through April 1995, Mr. Nourain discussed microwave licensing matters with Mr. Lehmkuhl. Nourain, Tr. 2300. However, he testified that Mr. Lehmkuhl never informed him that TWCNYC had petitioned against Liberty's

applications for other than I-block buildings. Nourain, Tr. 2300-01. Testimony at the January 1997 hearing directly contradicts this statement. See Findings, ¶¶ 38-40.

79. In order for Mr. Nourain's testimony to be believed, one must write in to both his February 21, 1995 affidavit and his May 17, 1995 declaration words that are not there, to limit the scope of each statement. Any party seeking to argue that words mean less than what they say shoulders a high burden. Liberty has not carried it here. There was abundant testimony at the January 1997 hearing that Liberty was greatly concerned about TWCNYC's petitions against Liberty's applications to serve previously unserved buildings. Mr. Nourain, as the person responsible for establishing the microwave links, was the person most directly and immediately impacted by this problem. To say that he did not know about it is not credible. The "I-block" applications, which Mr. Nourain says he was referring to in February 1995, had no urgency to them. A delay of the "I-block" applications would not hurt Liberty's relations with its customers. They were already being served by cable interconnect. Indeed, Mr. Nourain himself testified that he did not know when, if ever, these paths were planned for activation. Nourain, Tr. 2291. To say that when he participated in discussions about the status of license applications in February, March and early April 1995, Mr. Nourain assumed it was the "I-block" applications strains credibility past the breaking point.

C. Mr. Barr's "Clarification" Of His January 1997 Hearing Testimony Lacks Candor.

80. Liberty's Motion to Correct Hearing Transcript, filed on February 26, 1997, requests that Mr. Barr's testimony that he had never heard anyone suggest that Liberty had

engaged in premature service be limited to the January through April 1995 time period. Motion to Correct Hearing Transcript, Exhibit A at 7.

81. Mr. Barr testified that he wanted to make that change because "in my mind, those were the dates that the question referred to in retrospect as I was reading the transcript, the question appeared to be broader than my understanding and I just wanted to make it plain that the period of time that I was focusing on." Barr, Tr. 2121. Mr. Barr says his answer would not have changed based on the breadth or narrowness of the question. Barr, Tr. 2121. Mr. Barr claims that he narrowed the question for purposes of "clarity." Barr, Tr. 2127-28.

82. During the Bureau's questioning of Mr. Barr, the Bureau asked Mr. Barr whether his testimony was the same as information he conveyed to Liberty counsel. Weber, Tr. 2128. Mr. Weber explained that he had confidential, off the record discussions with Mr. Begleiter (Liberty's counsel) regarding what Mr. Barr told his counsel about the clarification of his testimony. Weber, Tr. 2129. This conversation occurred prior to the Bureau's filing of comments on TWCNYC's Motion for Limited Discovery and the Taking of Additional Hearing Testimony. Weber, Tr. 2130-31.

83. Bureau counsel stated that "it was conveyed to us in part what Mr. Barr has had to say about the clarification of his hearing transcript." Weber, Tr. 2131. Mr. Barr testified that the information conveyed to Liberty's counsel was the same as what he testified to at the hearing. Barr, Tr. 2133-34.

84. When the Presiding Judge asked the Bureau whether it had specific information that was inconsistent with Mr. Barr's testimony, Mr. Weber relied on the fact

that the Bureau did not have any direct discussions with Mr. Barr. Weber, Tr. 2137. When pushed as to whether the Presiding Judge could rely on Mr. Barr's testimony regarding the correction of the hearing transcript, Mr. Weber requested an off the record discussion with Liberty counsel. When the proceeding continued, Mr. Weber stated that "[w]hat has become more clear is that apparently what was conveyed to the Bureau was not entirely accurate of what Mr. Barr had conveyed to Liberty counsel or maybe more precisely it was an overstatement of what Mr. Barr conveyed to counsel." Weber, Tr. 2138-39.

85. In preparing their opposition to TWCNYC's Motion, Liberty counsel had discussions with Mr. Barr. Barr, Tr. 2135. Mr. Barr prepared a declaration in support of Liberty's opposition, but it was not included with the opposition. Barr, Tr. 2136. Mr. Barr testified that his testimony was consistent with any information in the draft declaration. Barr, Tr. 2136-37.

86. Liberty never made the draft declaration available in the proceeding, although it had the opportunity to do so. The self-serving statement attributed to Liberty's counsel to the effect that "it was pointless" to file Mr. Barr's declaration because he was going to be deposed anyway is not credible. Liberty filed declarations for other witnesses who were also identified as putative deponents -- Ms. Richter and Mr. Price. Liberty's Opposition to TWCNYC's Motion, filed March 21, 1997, Exhibits C, D. If Liberty truly believed that Mr. Barr's deposition would inevitably be taken, then it would not have opposed TWCNYC's motion, as it did, and it would not have included declarations from two other persons identified as witnesses.

87. Like Mr. Nourain's explanation of why there was no inconsistency between his February 21, 1995 affidavit and his May 17, 1995 declaration, belief in the credibility of Mr. Barr's explanation of his "clarification" requires acceptance of the notion that words do not mean what they say. Mr. Barr's limitation of the temporal scope of his hearing testimony, according to him, is meaningless because his answer -- "no" -- would be the same either way. Mr. Barr has not explained why he would have made a meaningless change in his testimony, and such an explanation is required in order for Liberty to carry its burden that its witness was testifying truthfully and consistently both in January and in May of 1997.

SUPPLEMENTAL CONCLUSIONS OF LAW

I. Liberty Bears The Burden Of Proving Its Candor And Credibility In Dealing With The Commission, And It Has Failed To Meet That Burden.

88. The Communications Act, the Commission's rules, and the HDO in this case assign to Liberty the "burden of proceeding with the introduction of evidence and burden of proof." 47 U.S.C. § 309(e); 47 C.F.R. § 1.254, HDO, ¶ 34. Specifically, where the matters in issue are solely within the knowledge of the applicant, as they are in the present case, the burden of proof on such issues is typically placed on the applicant. E.g., Catoctin Broadcasting Corp. of New York, 4 FCC Rcd 2553, ¶ 8 (1989). TWCNYC does not bear the burden of proving that Liberty lacked candor and credibility in dealing with the Commission regarding its unlicensed microwave operations. Rather, it is Liberty that must affirmatively prove that it acted forthrightly with the Commission during the application process and this hearing proceeding, and that it did not flagrantly disregard the Communications Act and the Commission's rules and policies.

89. Liberty has not presented affirmative evidence that it acted candidly and credibly in its many dealings with the Commission regarding the above-captioned applications. In fact, the substantial circumstantial evidence shows the contrary -- that Liberty lacked candor and credibility in dealing with the Commission in 1995 regarding its premature, unlicensed microwave operations in both 1993 and 1995, and that Liberty further lacked candor and credibility in dealing with the Commission in this hearing proceeding.

90. In addition to the substantial evidence set forth in TWCNYC's original Findings, the new evidence presented at the May 1997 hearing further establishes that Liberty lacked candor and credibility in its dealings with the Commission in 1995 regarding the above-captioned applications.

91. First, the record shows that Liberty was operating several microwave facilities without licenses or STAs in the 1992-93 time period, as well as in 1995. Supp. Findings, ¶¶ 23-29, 53-56; TWCV Exs. 14, 66; Attachments A-G. The relevance of this evidence to this case, which concerns premature activation in 1994 and 1995, is twofold. First, under Fed. R. Ev. 406, "evidence of the habit of a person or the routine practice of an organization . . . is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." Here, evidence that, as a result of the lawyers' inventory, Mr. Nourain knowingly had unlicensed microwave facilities in operation in March and April 1993 tends to show that he knowingly had such unauthorized facilities in operation in March of 1995, after he received the Lehmkuhl inventory that identified various recently, or about-to-be activated facilities as the subject of pending applications. L/B Ex. 1. Second, in the May 17, 1995 Surreply, Liberty told the

Commission that, except in the particular instances revealed, its practice had been to await a grant of authority from the Commission prior to placing a microwave facility in operation. TWCV Ex. 18. The existence of unauthorized activations in 1993 and the availability of documentary evidence (the company's business records, its lawyers' records and the applications themselves) of those activations shows not only that the statement in the Surreply was false, but that Liberty lacked candor with the Commission in making it.

92. The record further shows that these microwave facilities were made operational prematurely despite the fact that Liberty's management knew that microwave paths could not be operated without Commission authorization (Findings, ¶¶ 49-53), and despite communications by counsel in which counsel indicated that applications had only been filed, but not granted, or in some instances, that applications had not even been filed yet. Supp. Findings, ¶ 37; TWCV Ex. 3. Furthermore, these documents were prepared by counsel based largely on information provided by Mr. Nourain from his own records and personal knowledge. Supp. Findings, ¶¶ 19, 33. Thus, in 1995, Liberty had information readily available to it that informed the company's management that microwave facilities were being operated without any Commission authorization to do so.

93. The evidence further establishes that Mr. Nourain knew that something was amiss in April 1993 with the manner in which he was activating microwave paths, because he had numerous phone calls with Ms. Richter regarding such matters at that time. Supp. Findings, ¶¶ 40-41; TWCV Ex. 61. These phone calls were followed by a detailed letter from Ms. Richter setting forth, in no uncertain terms, the proper procedures for constructing and operating microwave facilities. Supp. Findings, ¶ 42; TWCV Ex. 51. Again, Liberty's

management had received communications from counsel indicating that there was a high probability that something was being done wrong, or that something would be done wrong, with regard to the construction and licensing of microwave facilities.

94. Mr. Nourain admits that he kept any licenses granted by the Commission in files in his office. Supp. Findings, ¶ 18. Mr. Nourain also admits that he never attempted to match any inventory lists he received from Ms. Richter with the licenses or STAs he had in hand, nor did he make any effort to verify the information contained in Ms. Richter's final inventory. Supp. Findings, ¶ 38; Nourain, Tr. 2240-41. Rather, Mr. Nourain regarded Ms. Richter's inventory as superfluous information, because he believed that everything contained therein was provided to her by him, and he therefore, knew what the inventory contained without having to review it. Supp. Findings, ¶ 38.

95. The record also shows that Liberty not only knew that it had to have Commission authorization (be it a license or a grant of STA) in order to turn on a microwave path (Findings, ¶¶ 49-53), but it was reminded of this important fact by counsel via telephone calls and a letter dated April 20, 1993. Supp. Findings, ¶¶ 40-43, 50; TWCV Exs. 51, 61. Even after Liberty received Ms. Richter's April 20 letter specifically advising it of proper Commission procedures for constructing and turning on microwave paths, Liberty continued to turn on paths without awaiting grant of Commission authorization. Supp. Findings, ¶¶ 53-56 ; TWCV Exs. 14, 66; Attachments E-G.

96. Thus, Liberty's statement in its May 17, 1995 Surreply that it "has been Liberty's pattern and practice to await a grant of either a pending application or request for STA prior to making a microwave path operational" is simply false. TWCV Ex. 18, at 3.

Moreover, Liberty knew that the statement was false when it made it on May 17, 1995. Supp. Findings, ¶ 71.

97. Second, the record shows that there is no evidence that any steps taken by Mr. Nourain in the process of applying for, installing and turning on various microwave paths were consistent with any timeline he claims to have followed. Supp. Findings, ¶ 58. The only timeline provided by counsel was one repeatedly set forth by Ms. Richter in letters to Liberty in which she stated that 18 GHz application processing should take 60-90 days, but her experience was that it was more like 120 days. TWCV Exs. 51, 56, 57. Mr. Nourain's actions do not correlate with this timeline. Supp. Findings, ¶¶ 54-56. Moreover, Mr. Nourain later claims to simply have established his own timeline based purely on his assumptions. Supp. Findings, ¶ 58. Based on that timeline, Mr. Nourain made microwave systems operational at what he considered to be the appropriate time. Supp. Findings, ¶ 58; Nourain, Tr. 2326-27. Again, Mr. Nourain's own actions do not even correlate with the timeline he claims to have created. Findings, ¶ 66.

98. Ms. Richter, Liberty's FCC counsel, also specifically stated that she never told Mr. Nourain he could assume anything with regard to the timing of the grant of applications. Supp. Findings, ¶ 59. Rather, Liberty was specifically cautioned by Ms. Richter about making any such assumptions. TWCV Ex. 51. Mr. Nourain, therefore, as a recipient of a copy of Ms. Richter's cautionary letter (Supp. Findings, ¶ 42), was on notice of proper microwave licensing procedures at least as early as April 1993. Any contrary "assumptions" he claims to have made in 1994 and 1995 are, therefore, a fiction that is contradicted by all of the evidence. E.g., Findings, ¶ 61. For example, Mr. Nourain's assumption that STAs

were simply coming in, even though none had been requested in early 1993, is wholly unjustified given the discussion regarding the option of applying for STAs in Ms. Richter's April 20 letter. Supp. Findings, ¶¶ 58, 60; TWCV Ex. 51.

99. Third, Mr. Barr's claim that his limitation of the temporal scope of an answer given on January 28, 1997 does not change the meaning of his answer lacks candor. Supp. Findings, ¶ 81. In fact, there still appear to be some missing pieces to the story of why Mr. Barr bothered to make this assertedly meaningless "clarification" of his hearing transcript. Supp. Findings, ¶¶ 82-84.

100. Mr. Barr has offered absolutely no reason for making the clarification other than "for purposes of clarity." Supp. Findings, ¶ 81. However, Mr. Barr admitted that, whether the question was worded the way it was at the hearing, or whether it was worded more narrowly, as indicated in his clarification, made no difference to his answer. Supp. Findings, ¶ 81. Why, then, did Mr. Barr need to clarify his answer? The real answer to this question remains a mystery. Barr, Tr. 2127-41.

101. It appears that during the course of Liberty's preparation of its opposition to TWCNYC's Motion for Limited Discovery and the Taking of Additional Hearing Testimony, Mr. Barr discussed the issue of his hearing testimony clarification with his attorneys, and sometime thereafter drafted a declaration to support Liberty's opposition to TWCNYC's Motion. Supp. Findings, ¶ 85. Mr. Barr's declaration ultimately was not attached to Liberty's opposition, nor was it made available in this proceeding. Supp. Findings, ¶¶ 85-86. While the Presiding Judge attempted to get on the record the full story behind the clarification, the aborted declaration and Mr. Barr's communications with counsel, he

admitted, "I just don't get the feeling that I'm getting the full scoop." Sippel, Tr. 2139. The fact that even the Presiding Judge believes pieces of relevant evidence are missing from the story shows that Liberty did not sufficiently establish a plausible reason for Mr. Barr's clarification of his hearing testimony. Liberty, therefore, has not met the burden of proving that Mr. Barr has dealt candidly with the Commission in this proceeding.

102. Finally, Liberty did not meet its burden of proving that Mr. Nourain acted forthrightly with the Commission by swearing to an affidavit and a declaration in 1995 containing contradictory statements of fact. Supp. Findings, ¶¶ 73-74. In his February 21, 1995 affidavit, Mr. Nourain swore that he was advised that TWCNYC had opposed various 18 GHz microwave applications filed by Liberty. TWCV Ex. 13; Supp. Findings, ¶ 73. In his May 17, 1995 declaration, Mr. Nourain swore that he read Liberty's Surreply and that the facts contained therein were true and correct to the best of his knowledge and belief. TWCV Ex. 18. The Surreply specifically states that "Mr. Nourain was unaware of the petitions against Liberty's applications until late April of 1995." TWCV Ex. 18, at 3; Supp. Findings, ¶ 74.

103. These two statements are inconsistent -- Mr. Nourain knew about TWCNYC's petitions to deny Liberty's microwave applications as of February 1995, but then he was unaware of those same petitions to deny until late April 1995. Both statements cannot be true.

104. At the hearing, Mr. Nourain testified that these two statements are not inconsistent in his view, because he claims that the February 1995 affidavit refers only to interconnecting, or I-block, buildings (i.e., buildings connected by coaxial cable wiring

(Nourain, Tr. 2297)), and the May 1995 declaration refers to the "16 or so" unlicensed paths. Supp. Findings, ¶¶ 75-76; Findings, ¶¶ 38-40. Moreover, Mr. Nourain claims that the February affidavit "has nothing to do with an application." Nourain, Tr. 2291. However, the very statement contained in Mr. Nourain's February affidavit references "Liberty's pending applications to the Federal Communications Commission for various 18 ghz [sic] microwave licenses." TWCV Ex. 13 (emphasis added). Mr. Nourain cannot have it both ways.

105. Mr. Nourain claims that he knew of TWCNYC's petitions to deny Liberty's pending 18 GHz applications only from a telephone conversation with one of Liberty's attorneys, and he assumed that these petitions were directed only at applications for OFS paths to replace cable interconnections based on his conversation with Mr. McNaughton. Supp. Findings, ¶ 77. Mr. Nourain's assumption is directly contrary to Mr. Lehmkuhl's testimony that he discussed TWCNYC's petitions to deny with Mr. Nourain during the January through February 1995 time period, and that he never suggested that such petitions were limited to only some of Liberty's aplications. Supp. Findings, ¶ 78; Findings, ¶¶ 38-40. Moreover, it is significant that Liberty never produced a corroborating statement from the attorney who Mr. Nourain claims to have been the source of this information.

106. Mr. Nourain's testimony regarding the inconsistent statements in his affidavit and declaration does not show candor with the Commission. At best, it is simply a plausible rationalization for a material inconsistency between two sworn statements. By failing to support this flimsy justification with other evidence, such as Mr. McNaughton's testimony as

to what he did tell Mr. Nourain in connection with his work on the February affidavit, Liberty has failed to meet its burden of proof on this issue as well.

II. Liberty's Alleged Reliance On Counsel Cannot Exonerate It From Its Failure To Act Forthrightly In Its Dealings With The Commission.

107. In the most recent hearing, Liberty has attempted, once again, to exonerate itself from its deceptive behavior before the Commission by claiming its good faith reliance on counsel to keep its regulatory affairs in order. Supp. Findings, ¶ 31; Price, Tr. 2179-80; Findings, ¶¶ 69, 81. This argument is misplaced, especially in light of the fact that Mr. Price, the president of the company, was warned by the company's regulatory counsel of the possibility of premature microwave operations as early as April 1993. Supp. Findings, ¶¶ 61, 63, 69; TWCV Ex. 51. Moreover, the fact that a principal of Liberty was put on notice of Liberty's potential for future violations of Commission rules and procedures <u>by its FCC counsel</u> severely undermines any claim Liberty may attempt to make regarding its good faith reliance on counsel.

108. Mr. Price received a copy of Ms. Richter's April 20, 1993 letter from Mr. Nourain on or about April 28, 1993. Supp. Findings, ¶ 61. Upon receipt of this letter, which Ms. Richter fully intended to "concern somebody" (Richter, Tr. 2046), Mr. Price did absolutely nothing. He conducted no investigation, made no follow-up calls to Mr. Nourain, nor any follow-up phone calls to counsel other than to discuss STAs with Ms. Richter. Supp. Findings, ¶¶ 63, 65, 67; TWCV Ex. 61. Mr. Price did not even forward the April 20 letter to the Milsteins, who "loved paper," and to whom he normally sent copies of things "to keep them in the loop on most matters." Price, Tr. 2185-86; Supp. Findings, ¶ 68.

109. This failure by Mr. Price to take any sort of action upon receiving a letter from counsel such as Ms. Richter's April 20, 1993 letter constitutes a reckless and willful disregard of serious warning signs by the company's regulatory counsel that something was amiss in Liberty's licensing process. Ms. Richter's April 20 letter plainly states

> some things were revealed during these conversations [with Mr. Nourain] that gave both Behrooz and I pause. In order to ensure that everything Liberty does is in strict accordance with the rules, and to ensure that your competitors are given no ammunition against you, I am writing this letter to detail the parameters within which construction and operation of new paths and new stations is permissible.

TWCV Ex. 51. This language alone was sufficient to put Mr. Price on notice regarding Ms. Richter's concerns about Liberty's licensing procedures. If Mr. Price wanted to show his good faith reliance on counsel, he should have taken some action in response to Ms. Richter's very serious warning. No such action was taken. Supp. Findings, ¶¶ 63, 65, 67. Moreover, Mr. Price's attempt to explain away the seriousness of Ms. Richter's April 20 letter is spurious at best. Supp. Findings, ¶¶ 66-67, 69.

110. Mr. Price further acted in total disregard of counsel's advice when he failed to compare the licensing information on Mr. Lehmkuhl's February 24, 1995 inventory with any of Liberty's installation progress reports. See Findings, ¶¶ 87, 214. Mr. Price felt that Mr. Lehmkuhl's February 24 inventory was important enough to forward the cover memo on to Messrs. Constantine, Berkman, and Howard and Edward Milstein. TWCV Ex. 65; Price, Tr. 2175-76. However, no one took any independent action to verify the information in the February 24 memo, or to compare it with Liberty's installation progress reports. See Findings, ¶ 87.

111. The fact that Mr. Price, the president of the company, received communications from counsel advising it on microwave licensing procedures, and the status of such applications, in 1993 and 1995, respectively, and he simply chose to disregard or ignore such communications weighs heavily against Liberty's claim that it was relying in good faith on counsel. Liberty Conclusions, ¶ 102. In fact, it establishes that Liberty was not only not relying on counsel's advice, but was completely disregarding any such advice. As the D.C. Circuit has written, "[t]he client becomes fully responsible at some point, and that point is reached more quickly in practice before the FCC than in courts of law." RKO General, Inc. v. FCC, 670 F.2d 214, 231 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 (1982); see also WADECO, Inc. v. FCC, 628 F.2d 122, 128 (D.C. Cir. 1980); see Reply Conclusions, at 18-19.

112. In the present case, if Liberty had actually relied on the communications sent to it by Ms. Richter and Mr. Lehmkuhl, and taken appropriate action regarding those communications, it could have avoided violating the Commission's rules and policies. Had it done so, Liberty would not have suffered for its reliance on counsel, because such reliance could have prevented or curtailed Liberty's haphazard practice of activating microwave facilities without Commission authorization. The "good faith reliance on counsel" defense is inapposite in such a situation. Cf. WEBR, Inc. v. FCC, 420 F.2d 158 (D.C. Cir. 1969) (applicant should not be disqualified on character grounds where he relied in good faith on advice of counsel not to disclose certain information to the Commission until after license was granted when, in fact, he should have informed Commission of the material change in his application).

113. Given Mr. Price's blatant disregard for counsel's advice, coupled with Liberty's material omissions and misleading statements in its May 4, 1995 STA requests (see, e.g., Conclusions, ¶¶ 263-66; Reply Conclusions, at 19), denial of Liberty's applications is not too harsh a sanction to be imposed here. See KQED, Inc., 3 FCC Rcd 2821 (Rev. Bd. 1988); Mid-Ohio Communications, Inc., 5 FCC Rcd 940 (1990); Conclusions, ¶ 267.

III. Denial of Liberty's Pending Applications Is The Most Appropriate Sanction For Liberty's Flagrant Violation Of The Commission's Character Policy, The Communications Act, And The Commission's Rules.

114. As set forth in detail in TWCNYC's original Conclusions, Liberty lacked candor and credibility in dealing with the Commission in the application process, the hearing process, and in its conduct of discovery. Conclusions, ¶¶ 239-82. Liberty also flagrantly disregarded the Communications Act and the Commission's rules and policies, specifically, the Commission's Character Policy Statement, 102 FCC 2d 1179 (1986); 47 U.S.C. §§ 301 and 308(b); and 47 C.F.R. §§ 1.17 and 1.65. Conclusions, ¶¶ 283-96. The facts set forth in the above Supplemental Findings further support the legal conclusions reached in TWCNYC's original Conclusions.

115. Liberty's numerous and repeated violations of the Communications Act and the Commission's rules and policies warrant the sanction of denial of Liberty's above-captioned applications, in addition to the imposition of a forfeiture. See Conclusions, ¶¶ 247-62. The Commission has determined that "[t]he unlicensed operation of a radio transmitter is one of the most serious violations under the Communications Act." Robert J. Hartman, 9 FCC Rcd 2057 (1994) (citing Mebane Home Tel. Co., 51 RR 2d 926 (1982)). Moreover, the

Commission has held that it can "treat even the most insignificant misrepresentation as disqualifying." Abacus Broadcasting Corp., 7 FCC Rcd 6004, 6009 (1992) (citing Character Policy Statement, 102 FCC 2d 1179, 1210), aff'd, 8 FCC Rcd 5110 (Rev. Bd. 1993). Similarly, the Commission's authority to revoke a license is not confined to situations where licensees have violated the law or the Commission's rules, but is much broader than that. Thomas H. Bowen, 40 FCC 2d 665 (1973).

116. The imposition of a forfeiture requires that certain statutory requirements be met. For example, the Communications Act and the Commission's rules provide that, before imposing a forfeiture penalty, the Commission will issue a notice of opportunity for hearing, and the hearing will be a full evidentiary hearing before an administrative law judge. 47 U.S.C. § 503(b)(3); 47 C.F.R. § 1.80(g). The HDO in this proceeding specifically stated that the HDO constituted notice pursuant to 47 U.S.C. § 503(b)(3). HDO, ¶ 36.

117. An evidentiary hearing has now been held before an administrative law judge, but TWCNYC does not concede that this hearing was a "full" evidentiary hearing, because significant, relevant evidence was not introduced or made part of the hearing record -- i.e., Liberty's Internal Audit Report ("Report").

118. After a full evidentiary hearing has been held, any forfeiture to be imposed must be within the established statutory amounts. In this case, the applicable provision is 47 U.S.C. § 503(b)(2)(C), which states that

> the amount of any forfeiture penalty determined under this subsection shall not exceed $10,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $75,000 for any single act of failure to act described in paragraph (1) of this subsection.